



2016

The Privatization of Law & the Weakening of Private Right

Jeffrey Kleeger

Florida Gulf Coast University, jkleeger@fgcu.edu

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ubjld>

 Part of the [Land Use Law Commons](#), and the [Law and Philosophy Commons](#)

Recommended Citation

Kleeger, Jeffrey (2016) "The Privatization of Law & the Weakening of Private Right," *University of Baltimore Journal of Land and Development*: Vol. 6 : Iss. 1 , Article 6.

Available at: <http://scholarworks.law.ubalt.edu/ubjld/vol6/iss1/6>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Journal of Land and Development by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

THE PRIVATIZATION OF LAW & THE WEAKENING OF PRIVATE RIGHT

Jeffrey Kleeger¹

Law promises much but does not always deliver. It promises due process, equal protection, equity, and personal autonomy—but many individuals leave litigation uncured. The trend in recent years has been increasing privatization of law coupled with diminution of private right. This paper explores ways to secure private rights despite privatization of law by enhancing the rigor of judicial review of state action. Law is one of several social systems operating in an environment of limited resources.² Access to oil and gas is, today, more controversial, difficult, and expensive than ever before because of increased environmental regulations created under the Obama Administration.³ Those regulations are currently under review by President Trump and some will be reversed. The easiest to extract oil and gas is long gone, but because the economy depends on energy, it is essential that a policy in support of economic development be crafted.

Environmental law regulations are necessary to protect the environment, but they do make extraction of energy resources difficult and costly. The privatization of law in oil and gas land use development is analyzed through the lens of takings. The result is public law positioned against private rights. The failed-now-revived Keystone XL and Dakota Access Pipeline⁴ projects

-
1. Jeffrey Kleeger, Ph.D., is Program Coordinator of Legal Studies and Chair, Department of Justice Studies at Florida Gulf Coast University, Fort Myers, Florida. He is an attorney with real property transaction experience. A draft version of this paper was presented at the 2015 Annual Meeting of the Law & Society Association in Seattle, Washington.
 2. NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (Routledge & Kegan Paul 1972) (1985).
 3. Coral Davenport, *Obama Bans Drilling in Parts of the Atlantic and the Arctic*, N.Y. TIMES, Dec. 20, 2016, available at https://www.nytimes.com/2016/12/20/us/obama-drilling-ban-arctic-atlantic.html?_r=0.
 4. Ashley Parker & Coral Davenport, *Donald Trump's Energy Plan: More Fossil Fuels and Fewer Rules*, N.Y. TIMES, May 26, 2016, available at <http://www.nytimes.com/2016/05/27/us/politics/donald-trump-global-warming-energy-policy.html?rref=collection%2Ftimestopic%2FKeystone%20XL&action=click&cont>

provide useful lessons in the development of administrative and takings law, judicial review, delegation, and separation of powers.

Pipeline extensions are privately owned, state-supported infrastructure projects. The state allows grants, tax benefits, and eminent domain assistance upon request of private developers.⁵ In November 2015, President Obama halted Keystone's quest to build an extension across the border with Canada. The president reasoned that supporting tar, sands, oil, and gas extraction would undercut his position on climate change.⁶ In September 2016, the president halted Energy Transfer Partners' Dakota Access project⁷ on similar rationale. Dakota Access is more controversial than Keystone because it is nearly complete, arguably threatens cultural artifacts and groundwater supplies, and its negative impact is imposed on a legally protected minority.

The cost to individual private rights and environmental protection must be weighed against social benefits, economic development and energy security considerations. The question is, do promised benefits justify expected costs? Given the decade-long record low in market price of oil and gas, coupled with record-high stockpiles of same, the issue of energy security is less a priority today than it once was. TransCanada was hopeful Keystone would be approved and continued to explore ways to reverse Obama's rejection.⁸

Similarly, Energy Transfer struggled for approval. The Army Corps of Engineers approved the environmental and safety studies, rights of way and

entCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=6&pgtype=collection&r=0; See also Associated Press, *Army Corps holds off on resuming Dakota Access pipeline work*, FOX NEWS, Oct. 10, 2016, available at <http://www.foxnews.com/us/2016/10/10/army-corps-holds-off-on-resuming-dakota-access-pipeline-work.html>.

5. Alejandro Dávila Fragoso, *For-Profit Pipelines Are Growing and So Are Eminent Domain Battles*, THINK PROGRESS, Jun. 7, 2016 available at <https://thinkprogress.org/for-profit-pipelines-are-growing-and-so-are-eminent-domain-battles-2b8bee7af3c#.yxv6vcelk>.
6. Coral Davenport, *Obama Expected to Reject Construction of Keystone XL Oil Pipeline*, N.Y. TIMES, Nov. 6, 2015, available at <http://www.nytimes.com/2015/11/07/us/obama-expected-to-reject-construction-of-keystone-xl-oil-pipeline.html?ref=topics&r=0>; See also Ian Austen, *TransCanada Seeks \$15 Billion From U.S. Over Keystone XL Pipeline*, N.Y. TIMES, Jan. 6, 2016, available at http://www.nytimes.com/2016/01/07/business/international/transcanada-to-sue-us-for-blocking-keystone-xl-pipeline.html?_r=1.
7. Jeffrey Weiss, *Why Were Dakota Access Pipeline Proponents So Slow To Join Public Debate?* DALLAS NEWS, Sept. 16, 2016, available at <http://www.dallasnews.com/business/energy/20160916-how-the-dakota-access-pipeline-went-from-tribal-protest-to-cause-celebre.ece>.
8. Austen *supra* note 6 (indicating Obama exceeded his constitutional authority).

permitting were obtained, but litigation delayed construction as native Americans sought injunctive relief alleging the land is sacred, the pipeline unsafe and global warming and water supply risks abound.⁹

Keystone and Dakota Access raise interesting questions about excess of power issues. Both offer a context to analyze current trends in land use and oil and gas development. Disputes involve businesses, judges and public officials responding to economic, emotional, political and social conflict over limited resources. The law cannot guarantee success in business, but it can provide an environment of certainty and stability necessary for effective planning.

For example, land use development failures include forced displacements not resulting in productive developments but creating failed expectations and unfair deprivations. In *Kelo v. City of New London*,¹⁰ economic development was held a proper justification for eminent domain and utilization a public use. There, a condemnation plan called for eviction of private citizens from their homes to construct a commercial development promising jobs and economic revitalization.¹¹ The promised public good was said to justify deprivation of private right. Deprivation occurred while public good was never realized. Once the dust settled post-eviction, the private developer exited over criticism about displacements. The land was used as a municipal dump-site for yard waste—the irony being such use is the reverse use of a commons, which historically was for collecting fuel. Recently, New London officials are considering restoring the land to its original residential use confirming the misguided nature of the original taking.¹²

Keystone is an international oil pipeline intended to promote national energy security, reduce consumer fuel prices and boost economic development. Critics argue the benefits are exaggerated.¹³ Dakota Access calls for pipeline infrastructure to enhance its ability to bring oil from fields to refineries for quicker, less costly processing. Criticism concerning Dakota Access involves risk of global warming, that the land is environmentally sensi-

9. Weiss, *supra* note 7; See also Associated Press, *supra* note 4 (courts held construction appropriate despite government agency review of tribal consultation process); See *infra* note 11, (discussing claimed economic benefits and environmental risks are both exaggerated).

10. *Kelo v. New London*, 545 U.S. 469 (2005) (eliminating blight requirement holding the state need only assert it is acting to promote some sense of public good).

11. *Id.* at 472.

12. Charlotte Allen, 'Kelo' Revisited, WEEKLY STANDARD (last visited Feb. 10, 2014), <http://www.weeklystandard.com/kelo-revisited/article/776021>.

13. Ryan Harrigan, Comment, *Transcanada's Keystone XL Pipeline: Politics, Environmental Harm, & Eminent Domain Abuse*, 1 U. BALT. J. LAND & DEV. 207, 209-210 (2012) (arguing benefits primarily accrue to Keystone, not the public and social burdens and risk of environmental harm are intolerable).

tive and is culturally sacred to Indians whose individual and social rights will be irreparably damaged.¹⁴

While true, environmental protection, delegation and eminent domain concerns exist, and no pipeline company can absolutely guarantee absence of environmental and human safety risks in oil and gas development; issues of national energy security and economic development persist.

Perhaps the trick of preserving while promoting is found in smart-growth that avoids environmental and individual damage while using science and technology to advantage. In the unfortunate circumstance land is damaged, restoration is possible; construction on Brownfields produces no new harm; but it would be naïve to suggest humans can maintain current lifestyles without negative environmental impact. Human progress cannot be in a risk-free environment.

Regardless of what one believes is the best course of action with respect to oil and gas development and environmental protection, on 24 January 2017, President Trump reversed Obama's block on construction of the pipelines, executed an order ending protracted environmental reviews and announced plans to ensure future pipelines in the United States (US) be constructed of American-made materials, permitting and regulatory approval requisites be minimized and expedited to promote American economic development opportunities.¹⁵

I. CONSTITUTIONAL CORPORATISM

This paper is premised on interconnections between constitutional separation of powers and the way public officials use delegated authority to advance policies promoting public good. Critics argue tools initially created to facilitate order and progress for public good may be used to promote private gain.¹⁶ The simple answer is a spillover effect occurs in any process of promoting public good. For example, consider a plan to take certain land and reallocate its use for the purpose of constructing a bridge creating social value and promoting economic development because it encourages commerce. Should such a project be halted because a private entity benefits or suffers loss?¹⁷ *Kelo* identified an unlawful pretext if the intended public

14. Weiss, *supra* note 7.

15. Peter Baker & Coral Davenport, *Trump Revives Keystone Pipeline Rejected by Obama*, N.Y. TIMES, Jan. 24, 2017, available at https://www.nytimes.com/2017/01/24/us/politics/keystone-dakota-pipeline-trump.html?_r=0.

16. Dana Berliner, Proceedings of the Seventh Annual New York Conference on Private Property Rights, PROPERTY RIGHTS FOUNDATION OF AMERICA, <https://prfamerica.org/speeches/7th/EminentDomainForPrivateGain.html> (last visited Mar. 19, 2017).

17. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

purpose is in fact primarily a private gain—but it is difficult to separate public and private benefits.

The taking power was applied historically to facilitate creation of public goods.¹⁸ That public purpose effort is the original intended use for takings at the American frontier. When a taking occurs and a community benefits from reallocating uses to enhance development, costs result and loss and damage is suffered by those deprived of prior uses. The ultimate conflict is between the state and individuals over the degree to which personal autonomy is lawfully sacrificed to promote an identified public good. Historically, takings functioned to prioritize certain uses over others to encourage utilization. When utility is enhanced, a logical next step is to broaden the range of possible uses to achieve greater social value. The only problem with equating utilization with public use is in deciding where to draw the line between private sacrifice and public good. This is particularly so if the state seems more interested in promoting corporate rather than social welfare.¹⁹ The issue is—what are appropriate restrictions on private rights when the state promotes public good? The calculus of negligence is applicable in this.

That question resonates in the thesis of this paper. The toolbox used by the state to encourage social welfare improvement includes devices such as police and regulatory power, takings and taxing and spending power. These powers are all exercised in the context of separation of powers. The trend toward privatization of law is expressed in the delegation process where private gain sometimes results. One significant characteristic state powers have in common is each may be used to promote public good at the expense of personal autonomy.

How much burden on a few individuals is worth how much public good? Can the damage imposed be justified by the good produced? All persons are included in the idea of what is public and all benefit from enhanced public good; yet a select few bear disproportionate burden, loss and sacrifice for the benefit of all. For example, all Americans derive generalized benefit from the Dakota Access extension producing enhanced energy security; but the Standing Rock Sioux tribe alleges it will suffer irreparable harm. In more recent years, the trend observed by researchers in land use law, indicates a weakening of owner-rights.²⁰ In India for example, land ownership

18. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 1 (Oxford Univ. Press, 1977, 1992).

19. John K. Murphy, *Constitutional Corporatism: The Public Use Clause as a Means of Corporate Welfare*, 2 U. BALT. J. LAND & DEV. 91, 91-92 (2013) (government using eminent domain for public goods and the expansion of the meaning of “public use”).

20. Jaivir Singh, *Separation of Powers and the Erosion of the “Right to Property” in*

is no longer a fundamental constitutional right.²¹ Instead, it is reduced to easement-like license to use.²² In the US, ownership can be abridged by the state to promote public good. This trend away from protecting private rights signifies private land is now more easily burdened, limited or cut short by the rule of law in the name of supporting social welfare good.

Environmental protection regulates development benefiting the public by promoting preservation, yet this approach restricts individual owner-freedom to profit from ownership. The important takeaway is whether state authority to interfere with ownership is sufficiently restrained. The public perception is individual rights are subordinate to state authority and private ownership must yield to public interest. For example, as Dakota construction is delayed, the company is deprived of its expectation of transport cost savings and suffers loss.²³

Across the globe, the trend toward privatization is noticeable with the beneficiary being corporate interests. Law's role in society is promoting order and progress and protecting individual rights against state encroachment.²⁴ Does halting a pipeline construction plan benefit the public and promote order and progress or harm individuals? The question is complex because circumstance impacts designation of value and "who" the "individual" is shifts, based on perspective. For example, is the Indian tribe seeking to stop the pipeline the impacted "individuals" or are they a subset of the public? Is protecting "individuals" justifiable if the result harms to the public? How much harm and to whom, is sufficient to justify state action?

When the state exercises power to promote public good, it operates through delegation. Public officials are delegated authority to act on behalf of the state and are charged with protecting private rights. Proper use of delegated authority is critically important and improper use unlawful. Presently, it is increasingly easier to encroach on private rights to promote public good. State-created institutions are concentric agents of the state, as are public officials. The two are philosophically congruent and subordinate private rights. The foundational unit of analysis is the individual case conceived of in the relationship between private rights and state power.²⁵

India, 17 CONST. POL. ECON. 303, 312 [hereinafter Singh, *Separation of Powers*].

21. *Id.*

22. THE CONST. OF INDIA, art. 31(2).

23. Meenal Vamburkar, *Dakota Pipeline Protests Rise on Hope Project is 'Keystone-ed'*, BLOOMBERG MARKET (Mar. 3, 2017, 5:35 PM), <https://www.bloomberg.com/news/articles/2016-09-15/dakota-pipeline-protests-rise-on-hope-project-is-keystone-ed>.

24. Singh, *Separation of Powers*, *supra* note 20 at 314.

25. Jaivir Singh, *(Un)Constituting Property: The Destruction of the "Right to Property" in India*, WORKING PAPER SERIES, August 2004, available at [http://www.jnu.ac.in/CSLG/workingPaper/05-Un%20Constituting%20\(Jaivir%20Singh\).pdf](http://www.jnu.ac.in/CSLG/workingPaper/05-Un%20Constituting%20(Jaivir%20Singh).pdf) [hereinafter Singh,

That law is increasingly privatized is evidenced by the rise in use of takings power to promote economic development.²⁶ Simultaneously, the need to justify state takings by claiming a substantial public good is less urgent or necessary. As the public is more willing to accept corporatism as a natural pathway toward progress, sacrifice of democratic processes is less difficult to achieve—corporatism is marked by sacrifice, abrogation and avoidance of consensus in the interest of efficiency.²⁷ The most recent example of this is how Dakota Access²⁸ and Keystone²⁹ appear on track to be approved. President Trump's election victory is a symbol of capital accumulation prevailing over environmental sensitivity. The final defense against approval is the media claim the projects are more corporate than social-welfare oriented.³⁰

Keystone was litigated in *Thompson v. Heineman*.³¹ There, issues of delegation, due process, equal protection and separation of powers were underlying themes. The dynamic of takings law presents a backdrop for contrasting the promise of law (which is divine), and its irreverent pathos. While the state is duty-bound to apply the law to safeguard owner-rights, the law falls short when tolerating interference with those rights. The constitution provides guidance to public officials with respect to how to execute their duty of governance, guarantees certain rights to individuals and is widely considered the highest source of law;³² yet its function to prescribe powers and restrict officials from excessive action does not always secure rights.³³

The separation of powers concept is a response to concentrated power and risk of excess. The more dispersed organization of layers in the former is intended to resolve the perception of abuse arising in unilateral concentration of authority necessary to achieve results. Executive and legislative powers are intentionally diffused in competing units to check and balance authority. Concentrating and separating power enhances equity, facilitates functionality and better protects.

(Un)Constituting Property].

26. Murphy, *supra* note 19.

27. *Id.* at 91.

28. Dave Kolpack, *Court halts construction of another Dakota Access oil pipeline section*, NORTHWEST HERALD, (Mar. 16, 2017, 8:34 PM), <http://m.nwherald.com/2016/09/18/court-halts-construction-of-another-dakota-access-oil-pipeline-section/at6f0jk/>.

29. Ryan Harrigan, *Transcanada's Keystone XL Pipeline: Politics, Environmental Harm, & Eminent Domain Abuse*, 1 U. BALT. J. LAND & DEV. 207 (2012).

30. Murphy, *supra* note 19.

31. *Thompson v. Heineman*, 857 N.W.2d 731 (2015).

32. Singh, *Separation of Powers*, *supra* note 20 at 314.

33. Singh, (Un)Constituting Property, *supra* note 25 at 1-2.

Ultimately, the fate of the pipeline extensions are political questions. With Keystone, the Nebraska State Supreme Court did not prohibit construction—its decision, a bit complex due to Nebraska’s unique political structure, seemingly approved construction.³⁴ With Dakota Access, federal courts have repeatedly ruled construction may proceed. It was federal executive rejection that blocked construction in both cases. Just weeks after President Obama formally denied permit approval to TransCanada, state regulators in South Dakota approved the contested section of the pipeline.³⁵ These conflicts raise questions about the proper scope of state interference with private rights, the appropriate balance in separation of powers and what form and scope of delegation is proper.³⁶

II. THE IMPACT OF PUBLIC LAW ON PRIVATE RIGHTS

Some theorists view compulsory acquisition as a measured, conservative use of political power, legitimately applied to encourage economic development by more efficiently allocating resources making it an effective tool to promote public good.³⁷ Law is a servant of the state, a means to an end, a social construct and by-product of blending economic theory with practice subject to political and social pressure to promote beneficial reform.³⁸ But law is also something more—it is the essence of balancing safety and freedom that represents the means to preserve and promote individuality.³⁹ Transformation in law—meaning modification intended to address social problems, presents popular agreements about formal social response to conflict.⁴⁰

The Nebraska Supreme Court was faced with crisis when called upon to decide Keystone. Conflicting demands of economic need, individual rights, political and social pressure operated to move the governor and legislature to collaboratively promote a joint venture, public-private partnership in the pipeline.⁴¹ The infrastructure improvement plan required a few private citizens be forced to suffer restrictions on ownership to facilitate public good.⁴²

34. *Thompson*, 857 N.W.2d at 766.

35. Associated Press, *South Dakota: Keystone XL Pipeline Permit Renewed*, N.Y. TIMES, Jan. 5, 2016, available at <http://www.nytimes.com/2016/01/06/us/south-dakota-keystone-xl-pipeline-permit-renewed.html>.

36. *Id.*

37. HORWITZ, *supra* note 18.

38. BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 6-7* (Cambridge Univ. Press, 2006, 2007).

39. HORWITZ, *supra* note 18.

40. *Id.*

41. *Thompson*, 857 N.W.2d at 740.

42. The claimed benefits of new jobs, lower consumer prices, economic development gains and promoting national energy security are criticized in the literature as illusory; *See Kelo v. New London*, 545 U.S. 469 (2005).

The plan was proposed a decade ago, at a time when the economy was suffering, the market price of oil and gas were at all time-highs, energy security appeared at risk due to volatility in the Middle East, and there was no end in sight to the economic, political and social uncertainty created by the war on terror.⁴³ It appeared crisis justified state interference with and restriction on private rights.⁴⁴ Public officials acted to address the crisis.⁴⁵ The pipeline extension was part of that effort.⁴⁶

Effective land use management requires consensus among interested parties, or a court order mandating reform.⁴⁷ The legal system is in place to provide a means for dispute resolution. Law is a tool, and means to the end, of achieving stability and prosperity in economic and social relations through use of logic and neutrality.⁴⁸ However, when inconsistent objectives arise—such as protecting private property and the environment, or promoting alternative land uses to encourage economic development and promote national security; certain interests must yield to others and harm or sacrifice be suffered to effectuate more efficient allocation of resources.⁴⁹

This is the meaning of utilization as public use—a concept holding enhanced utilization is automatically public good.⁵⁰ The idea is consistent with the notion of yielding private rights to public good. The traditional example is taking private property to construct a public hospital, road, school or utility. The role of law is to manage the transaction to force a desired reallocation of uses the market fails to achieve, to secure social good.⁵¹ The law and economics literature justifies takings as economic reordering to solve social problems. Thus, intrusive state action is excused making it appear the objective is serving public good.⁵² *Korematsu v. US*⁵³ held national security is public use and *Kelo* extended the concept to economic development.⁵⁴

In *Keystone*, the judiciary was called upon to resolve a conflict between private property rights and public good.⁵⁵ The lower court ruled plaintiff-

43. *Thompson*, 857 N.W.2d at 740.

44. *Id.*

45. *Id.*

46. *Id.*

47. TAMANAHA, *supra* note 38 at 6-7.

48. *Id.*

49. *See Kelo*, 545 U.S.; *see also* *Korematsu v. United States*, 323 U.S. 214 (1944).

50. *Kelo*, 545 U.S. at 469; *Korematsu*, 323 U.S. at 214.

51. Singh, *Separation of Powers*, *supra* note 20 at 304.

52. *Id.*

53. *Korematsu*, 323 U.S. at 223-24.

54. *Kelo*, 545 U.S. at 486-89.

55. *Thompson*, 857 N.W.2d at 739-40.

owners established taxpayer standing, were legitimately aggrieved by pipeline approval⁵⁶ and the complained of state action was an unlawful delegation of authority to the executive.⁵⁷ On appeal, although the state Supreme Court agreed with the lower court ruling, it nevertheless condoned construction by not invalidating the statute in question.⁵⁸ So the issue remains, did the legislature properly authorize the pipeline?⁵⁹ The court did not address the merits of the case,⁶⁰ reinforcing Rosenberg's Hollow Hope thesis.⁶¹

The primary purpose of taking private property is promoting public good. There is an implicit obligation on the part of the state to protect individual personal autonomy and limit takings by a standard of necessity.⁶² The question is whether that standard was satisfied. The precipitous drop in oil and gas prices weakened the energy security justification for the pipeline, emboldening Obama to reject the extension in favor of environmental concerns.⁶³ The claim of risk of environmental degradation can never be entirely eliminated in oil and gas development.⁶⁴

Thompson is a curious decision—four of seven judges agreed the statute was unconstitutional; but the merits were not reached. The legal issues raised in *Thompson* include a claim the statute inappropriately transferred constitutionally-granted authority of regulating common carriers from the state Public Service Commission (NSPSC) to the governor, and that the statute unlawfully authorized the governor to transfer legislative eminent domain power to a private entity.⁶⁵

Courts typically dispose of cases on technical bases if possible as a mat-

56. *Id.*

57. The legislature was criticized for transferring route-setting power to the governor and takings power to Keystone. *Thompson*, 857 N.W.2d at 736.

58. *Id.*

59. Kathleen Miller, *The Fifth Judge: Thompson v. Heineman and Nebraska's Judicial Supermajority Clause*, NEB. L. REV. BULL. (June, 2015).

60. *Id.* (citing *Thompson*, 857 N.W.2d at 739-40.); see NEB. CONST. art. V, § 2.

61. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (The Univ. of Chicago Press, 1991) (claiming courts do not possess the tools necessary to effectuate meaningful social change).

62. The Takings Clause declares a taking must be for a public purpose and just compensation must be paid to those deprived of ownership rights; it is assumed officials only act upon necessity.

63. Coral Davenport, *Citing Climate Change, Obama Rejects Construction of Keystone XL Oil Pipeline*, N.Y. TIMES (Nov. 6, 2015), https://www.nytimes.com/2015/11/07/us/obama-expected-to-reject-construction-of-keystone-xl-oil-pipeline.html?_r=0 [hereinafter Davenport, *Obama Rejects Keystone Pipeline*].

64. Noah Greenwald, *America's Disastrous History of Pipeline Accidents Shows Why the Keystone Vote Matters*, THE HUFFINGTON POST, Nov. 18, 2014, available at http://www.huffingtonpost.com/noah-greenwald/pipeline-accidents_b_6174082.html.

65. Miller, *supra* note 59 at 845 (citing *Thompson*, 857 N.W.2d at 736).

ter of judicial efficiency. In *Thompson*, three judges declined to consider the merits holding plaintiffs lacked standing.⁶⁶ When private rights are not fairly protected, individual liberty suffers and uncertainty results. Economic and social prosperity depend on certainty and stability in relations of production, supported by law. Parties demand confidence agreements will be enforced.⁶⁷ In the context of ensuring appropriate balance between protecting private rights and promoting public good, the scope of judicial review is significant.⁶⁸ In *Thompson*, effectively there was none.

An alternative approach is situationally determining the need for enhanced, more robust review. When a complete administrative record is created and public officials act transparently following proper procedure, then courts are justified in extending greater deference to decisions reached by such officials.⁶⁹ The opposite result is appropriate should there be a less substantively developed record or failure to adhere to proper procedure. Moreover, political considerations are relevant. While benefit to a private interest is not unlawful per se, there is a sense promoting private advantage raises conflict of interest concerns. Promoting public good must be the primary purpose of state action and if a private party primarily benefits, that could be unlawful pretext.⁷⁰

Some theorists argue concentrations of power damage individual rights, but separation of powers corrects it.⁷¹ There are benefits and costs associated with takings. Benefits include creation of positive results when public officials engineer a certain economic, political and social climate conducive to promoting public good; and costs include unintended consequences of negative interference with personal autonomy by way of expropriation.⁷² Other costs include risk of misallocating resources and diminished public good.⁷³ The law on takings is increasingly privatized in recent years by activist officials promoting public-private partnerships using takings.⁷⁴ This privatization trend by public authority is enhanced by judicial deference to policy decisions. Understanding the scope and boundary of proper delegation elucidates the privatization of law trend.

66. *Id.* at 859.

67. NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (Oxford Univ. Press, 1993, 2004).

68. Singh, *Separation of Powers*, *supra* note 20 at 304.

69. *Thompson*, 857 N.W.2d at 736.

70. *See Kelo*, 545 US 469 (2005).

71. Singh, *Separation of Powers*, *supra* note 20 at 314-315.

72. *Id.* at 305.

73. *Id.* at 316.

74. *See generally* Miller, *supra* note 59.

III. THE PROPER BOUNDARY OF DELEGATION

The lower court in *Thompson* ruled the legislation authorizing the governor to approve the pipeline route was unlawful delegation of regulatory authority and intrusion upon prior-granted constitutional powers.⁷⁵ The Court reached that result because authority to regulate common carriers in Nebraska was placed firmly in the hands of an independent, constitutionally-established commission. The court held the legislature lacked authority to delegate a regulatory power it did not possess.⁷⁶

There exists a lawful and rational place in governance for delegation to enable the state to minimize transaction costs incurred in policy-implementation. This is the reason public-private partnerships are so attractive. While it is incumbent upon public officials not to delegate their power of policy making, the rationale supporting delegation is the value in minimizing the cost of governance and maximizing efficiency granting experts discretion to act consistent with policy.⁷⁷ The relationship between public-private partnerships, economic development and rule of law establishes a baseline for determining whether delegations are lawful.

Government entities have long struggled with how to provide services to better satisfy fiduciary duties and public purpose objectives. One approach is to form public-private partnerships by which public and private sector entities associate, share skills, assets, risks and rewards in joint-venture.⁷⁸ Typically such partnerships are a vehicle by which the parties explore means to more effectively achieve desired results. Good government welcomes private participation for the knowledge, skills and capital investment resources contributed by the private sector; and private enterprise welcomes the stability, tax and permit benefits and more secure return on investment made possible by partnering with the state. Such partnerships are enabled and constrained by the degree of accountability respected in the relationship.⁷⁹

The downside to infrastructure development joint-venture planning is land must be assembled to implement improvements and individuals must be displaced of possessory interests to assemble the needed land. Assem-

75. *See Thompson*, 857 N.W.2d at 736.

76. A reasonable interpretation of separation of powers suggests the legislature could lawfully restrict the commission's jurisdiction over common carriers.

77. Singh, *(Un)Constituting Property*, *supra* note 25 at 3-4.

78. Scott Walchak, Remarks at the University of Baltimore School of Law Journal of Land & Development Symposium: Public-Private Partnerships: A Vehicle for Economic Development and Promotion of the Rule of Law (April 9 2015), in 4 U. BALT. LAW J. LAND & DEV. Vol. 4, Iss. 2, Article 2, 105, 109 (edited transcript available at: <http://scholarworks.law.ubalt.edu/ubjld/vol4/iss2/2>).

79. *Id* at 111.

blage of large tracts almost always impacts a number private owners.⁸⁰ Delegation is often discussed in terms of legislative power, although delegation commonly occurs at every level and form of government. The concept of non-delegation refers to the illegitimacy of a grant of express authority to make policy decisions.⁸¹

The takings clause authorizes the state to take private property to promote public use; it does not authorize the state to delegate takings power to private parties or condone takings for private use.⁸² Although delegation is permissible to improve public service by facilitating the ability of public officials to accomplish assigned tasks more quickly and cost-effectively, allowing experts to exercise discretion to resolve ambiguity⁸³ in the execution of lawfully assigned duties; there are certain boundaries beyond which delegation ceases to be lawful.

A party with proper authority to act in a given field may legitimately delegate certain tasks, so long as proper direction is provided to the recipient. Grants of authority permitting a substitute to act under a given set of circumstances is not the equivalent of abdication of authority. It logically follows, a party to whom delegated authority is conferred may lawfully sub-delegate to others to perform certain tasks, so long as all proper direction is provided.⁸⁴ It is useful to view the separation of powers concept in terms of delegation because separation of powers mandates certain authority cannot be delegated to a designee whose jurisdiction is too distinct from the location within which the power to act originates. Interactions across various branches⁸⁵ are better understood as compromise aimed toward reaching consensus about how best to resolve a social problem⁸⁶ and promote public good.

Costs incurred in delegations are minimized by unifying tasks to maximize efficiency and achieve synergy.⁸⁷ Similarly, it is possible to view private

80. Singh, *Separation of Powers*, *supra* note 20 at 305, 315-316 (such property rights include the power to acquire, hold, dispose of or exclude others from use).

81. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201 (2001).

82. Edward J. Sullivan, A BRIEF HISTORY OF THE TAKINGS CLAUSE, *available at* http://landuselaw.wustl.edu/articles/brief_hx_taking.htm (last visited Mar. 22, 2017).

83. Barron & Kagan, *supra* note 81.

84. *Id.* (presenting a thesis that review of delegation should focus on the recipient of the authority (the delegate) and her responsibility for decision-making as opposed to the form of delegation granted in terms of its generality or specificity or whether the procedure is formal or informal).

85. Singh, *Separation of Powers*, *supra* note 20 at 316.

86. Singh, *(Un)Constituting Property*, *supra* note 25 at 6.

87. *Id.* at 6.

property rights in the context of an interplay between positive efforts by the state to engineer certain economic, political and social configurations to promote public good; while acknowledging the risk of negative violations of private rights that can be highly damaging to personal autonomy.⁸⁸

Nebraska's unique form of government structure, its unicameral legislature and super majority rule in the judiciary⁸⁹ caused a different result than what might otherwise have been expected in Keystone's application process. Nebraska has a history of stacking the odds in favor of citizens' rights, for example by creating an independent regulatory entity charged with approving common carrier rates and routes, the state sought to ensure the absence of conflict of interest.⁹⁰ Nebraska's unicameral legislative form, coupled with its supermajority judicial requirement for overturning legislative acts, appears to favor citizens⁹¹ and cost effectiveness along with representative government. The purpose motivating these unique approaches were to save money, time to get legislation enacted and to avoid corruption, all for the public good.⁹²

It should come as no surprise then that in its legislative enactment, Nebraska statutorily developed its own separation of powers framework.⁹³ The transfer of power attempted by the legislature was a delegation to the executive of specific authority to achieve a particular result intended to benefit the public. Such special interest legislation, however, is inherently suspicious, and by most accounts, unlawful.⁹⁴ In this case it illegitimately bestowed legislative takings power on a private entity via transfer from the legislature to the governor to Keystone. It is interesting the supermajority requirement intended to support representative government and minimize the risk of judicial activism prevented the court from overturning the stat-

88. *Id.* at 7.

89. Miller, *supra* note 59 at 4.

90. *Id.*

91. NEB. CONST. art. IV, § 20. The Public Service Commission was created in 1885 by the Legislature to regulate railroads. A constitutional amendment to establish the commission was ratified in 1906. The Commission holds broad oversight and administrative powers over telecommunications, natural gas and oil pipelines, utilities and is charged with determining policy on communications and public service. See *Brief History of the Commission*, NEB. PUB. SERV. COMM'N., <http://www.psc.nebraska.gov/admin/history.html> (last visited April 6, 2017).

92. See NEB. CONST. art. IV, § 20

93. Legis. B. 1161, 102nd Leg., 1st Spec. Sess. (Neb 2012). This law shifted power to the executive and took oversight away from the independent administrative agency tasked with regulating oil and gas utilities.

94. See generally Chris Edwards, *Special-Interest Spending*, CATO INST. (April 2009), <https://www.downsizinggovernment.org/sites/downsizinggovernment.org/files/pdf/special-interest-spending.pdf> (detailing the dominance of special interests in government subsidies).

ute, because if the governor and legislature were indeed complicit in unconstitutionally by-passing an authorized agency's authority, then the delegation was in fact unlawful and the better legal result is voiding the law.

The Nebraska State Supreme Court, by constitutional fiat,⁹⁵ may only strike a legislative act with supermajority approval—three of seven judges holding the case was not properly before them prevented that. Although four judges agreed to address the merits, their conclusion the statutory delegation was unlawful was not binding or precedential. One way of making sense of the result is to recognize *Thompson* as a case decided upon a procedural technicality.⁹⁶ An alternative view is to conclude law is a tool of the state and is typically used to facilitate capital accumulation. If this latter view is accepted, it demonstrates the privatization of law thesis that the state is indeed transformed into capital, and law is increasingly privatized.

IV. THE LAWFUL SCOPE OF DELEGATION

The lawful scope of delegation is viewed from an internal rather than external perspective. Delegation is a challenge to the separation of powers regime—it blends the functions and powers of distinct branches of government and blurs practical distinctions. Concentrating the powers of separate branches in one unit or single source is problematic—it increases the possibility of abuse by rogue delegates whose intention is self and other-serving. Courts have long grappled with this problem without finding a satisfactory solution. Critics complain the rigor of judicial review is insufficient to meet this challenge, and courts tend to review acts of sister branches with too great a presumption of validity.⁹⁷ The continuum of appropriate discretion is situational. Excessive delegation, meaning dispensation of authority that goes beyond the proper boundary minimally necessary to achieve sufficient effect, amounts to abdication of responsibility by the grantor.

The lawful scope of delegation was worked out in a number of US Supreme Court decisions, but remains subjective in its application. The basic premise is no body or government can effectively complete all the work it is tasked with, and so it is left without recourse to outsource some of its responsibility to act, along with the minimally proper measure of requisite authority necessary to those better suited, placed, trained or in possession of required resources to more effectively perform and achieve results.⁹⁸

95. NEB. CONST. art. V, § 2 (declaring no legislative act shall be held unconstitutional except by concurrence of no less than five state supreme court judges).

96. *See Thompson v. Heineman*, 289 Neb. 798 (2015).

97. Barron & Kagan, *supra* note 81.

98. Efficiencies of scale, expertise, proximity and resource-accessibility are measures of success.

The legal system recognizes the necessity and sufficiency of certain delegations, but also maintains some are inappropriate, because the scope or boundary of appropriate dispensation is exceeded. This can happen, for example, if a branch or unit attempts to delegate authority to another when it ought not to have, as when the intended delegate is incompetent to receive the power conferred,⁹⁹ or the delegator does not possess the full measure of authority it is attempting to grant. An example of a proper delegation that enhances effectiveness is a Congressional grant of tax enforcement authority to officials in the Internal Revenue Service to act as an agent for revenue collection. Proper delegations occur at all levels of government, across all branches and sub-delegations may in certain circumstances be entirely appropriate.¹⁰⁰

Factors a reviewing court may consider in deciding whether a delegation is proper include the degree of authority assigned—whether the authority to implement a certain policy is a proper subject of delegation; but the task of formulating policy is not properly delegable. Moreover, the grantor must publically declare the policy intended and fix the legal principles that control in given instances providing clear and intelligible direction to guide the delegate in action.¹⁰¹ If a standard is established and intelligible guiding principle adequately stated, the delegation is lawful.¹⁰²

Sufficiency is by no means universally apparent. Generally, a delegation must be necessary, and the scope of authority assigned as minimal as possible to accomplish the task. The validity of a delegation depends on the rigor of judicial review—when review is at low-levels, a delegation is more readily acceptable in terms of meeting minimum thresholds of necessity and sufficiency. Such determinations of legitimacy depend on how interpretive decisions are made with regard to the application of authority, whether the scope of authority granted is unnecessarily or unlawfully excessive and the degree of deference a reviewing court will apply in its examination and determination of the record provided by the delegate.¹⁰³

The separation of powers holds it a breach of constitutional law for a delegator to fully release the absolute extent of her constitutionally-granted power or to blindly transfer his entire authority in a given field to another.¹⁰⁴ Nevertheless, a delegation is lawful, even where considerable discre-

99. *In re The Delhi Laws Act, 1912 v. The Part C States (Laws) Act 1950*, 1951 AIR 332, 1951 SCR 747 (1951).

100. Barron & Kagan, *supra* note 81 at 201 (indicating a sub-delegation is appropriate if it better effectuates the original delegation).

101. *In re The Delhi Laws Act, 1912*.

102. *Id.* (noting that delegations must be necessary and minimally sufficient to achieve the intended results).

103. Barron & Kagan, *supra* note 81 at 201-202.

104. *See J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394 (1928).

tion is conferred, when such discretion is characterized as ministerial and falls neatly within an established policy.¹⁰⁵ For example, the Court in *Hampton* explained the critical distinction for recognizing legitimacy of a delegation is in the difference between delegation of power to make law (incorporating discretion to determine what the law shall be) and conferring authority to execute the law within lawful guidelines (recognizing the necessity of strict adherence to procedural requirements).¹⁰⁶ This means delegation is capable of merging separate powers into a unitary authority in contradiction to the premise of separation of powers.

The rationale for delegating authority is no entity can effectively manage all aspects of its responsibility without assistance. As a result, and in the interest of promoting efficiency, legislatures often delegate certain elements of authority to those better suited to act. Such delegations are lawful so long as broad general directives and limits on authority granted are established in advance, are public and the grantor retains the bulk of its original powers.¹⁰⁷

In *Hampton* it was observed one branch must not relinquish or transfer its power to another or attempt to invest itself of the power of another.¹⁰⁸ *Field v. Clark*¹⁰⁹ holds the executive cannot be invested with the power to make law and if the legislature clearly sets forth standards adequate to guide the executive in its application of conferred authority, the executive may exercise limited discretion in executing the task.¹¹⁰ Indeed, the exercise of delegated power requires some interpretation by the delegate as to how to go about completing the task.

A delegation of authority is a deed of trust—the delegate must take responsibility and remain accountable to the exercise of authority.¹¹¹ The Court in *Field* explained the basic foundation for understanding the scope of a proper delegation is between the use of power to make law, which involves discretion as to what the law shall be (substance); and the use of power in the execution of the law which involves discretion as to what appropriate steps to take (process)—and more importantly, that the former is not deemed the equivalent of the latter.¹¹²

105. *In re The Delhi Laws Act*, 1912.

106. *See generally J.W. Hampton, Jr. & Co.*, 276 U.S. at 394.

107. *Id.*

108. *Id.*

109. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

110. *Id.* (discussing the premise a delegate may use discretion to properly execute a task on behalf of a grantor but may not assume the complete authority belonging to the grantor).

111. *Barron & Kagan, supra* note 81 at 201-02, (describing a proposed approach to determine the appropriateness of a delegation of considering the identity of the delegate-decision-maker and degree of responsibility assumed).

112. *Field*, 143 U.S. at 695.

In *Field* the Court held the legislature cannot, without limits attached, delegate its power to make law; yet the legislature can make a law under the premise that certain acts may require reasonable, interpretive discretion in their execution, permitting a grantee of authority to make wise and careful inquiry into the facts and circumstances in a set of unknown variables and therein apply her judgment to ensure logical, responsible and justifiable results are achieved.¹¹³ The legislature may broadly enact all the laws it deems necessary and proper to effectuate its enumerated powers, such as the power to tax, spend, take and otherwise safeguard and promote public good.¹¹⁴ As applied pipeline permit approval, for example, the Nebraska Legislature is empowered to establish a commission or agency for the purpose of setting rate and route regulations consistent with a general policy standard that utility or common carriers operate fairly, without discrimination and for the purpose of benefitting the public; although some allowance for corporate profit is recognized as acceptable, as held in *Smyth v. Ames*.¹¹⁵

If the above is generally accepted as a permitted norm in government functionality, what makes *Thompson* noteworthy and why is the legislature deemed to have exceeded its authority? The answer lies in making sense of differing conclusions about how delegated authority should be exercised in the context of separation of powers because it is the legislative branch that determines what the law shall be. As long as constitutional principles and restrictions on exercise of government power are satisfied, a delegation permitting deprivation of private right is, all else being equal, legally acceptable.¹¹⁶ Despite the distinctions described above, the legislature cannot delegate its purely legislative function to any other branch—what the legislature can do is delegate certain powers to establish general rules of action and may turn over to its grantee certain discretion with respect to the execution thereof; but only so long as the delegated powers are not all-inclusive and limits on authority are clearly defined.¹¹⁷

Consistent with the above, a lawful delegation must offer precise standards as to scope of authority in regulated subject matter. Furthermore, there must be safeguards such that the public is properly protected against possibility of abuse of delegated authority by limiting the scope of discretion, which goes to the heart of interpretive authority.¹¹⁸

113. *Id.* at 685.

114. *Id.* at 695-96.

115. *Smyth v. Ames*, 169 U.S. 466, 523-25 (1898), *overruled by* Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am., 315 U.S. 575 (1942).

116. *Id.* at 523-25.

117. *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409-10 (holding the intelligible principle holds delegation lawful if coupled with a clear and common-sense directive about how the grantee may act).

118. *Chevron, U.S.A. Inc., v. Natural Resource Defense Council, Inc.*, 467 U.S. 837

Finally, it is important to observe acts that take effect upon a contingency are not the making of law. Rather, such acts constitute execution of prior-made law.¹¹⁹ Thus, delegations are lawful when the legislature provides a grantee with a clear understanding of what is to be accomplished and a general sense of how to do it. The structure of the grant must be immersed within the “intelligible principle standard”—which is to say the delegate must act with common sense in the context of the situation.¹²⁰ With respect to the Nebraska delegation, the question is whether the legislature properly followed rules concerning how to effectuate a lawful delegation.

V. THE NON-DELEGATION PRINCIPLE

Chevron USA Inc., v. Natural Resource Defense Council, Inc.,¹²¹ began an intellectual conversation about what the boundaries of judicial deference ought to look like. The discussion began in the context of administrative law which is the appropriate language to use to regulate delegations. The rule of deference introduced in *Chevron* is quite high as only those delegations viewed as excessively overbroad are ever invalidated by courts.¹²² So what does an over-broad delegation actually look like? It is one that provides the delegate with little or no guidance in application of discretion, and requires no preliminary findings of necessity to justify authorizing a broad, generalized authority to act.¹²³ This does not mean specificity as to the scope of action to be taken by a delegate is absolutely necessary; but it does mean a delegate may not possess absolute, unlimited discretion to act in a field that falls within the jurisdiction of another branch. The test for lawfulness is whether the grant declares a policy, establishes a standard and lays down a clear, comprehensive rule of law.¹²⁴

The power to delegate, while broad, has been increasingly constrained in

(1984).

119. *Id.* at 862.

120. *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409.

121. *Chevron, U.S.A. Inc.*, 467 U.S. at 865-66.

122. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418-19 (1935); *see also* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 525-26 (1935) (condemning involvement of private trade groups in the creation of binding codes of competition in conjunction with government agencies because the statute lacked adequate guiding standards).

123. *In re The Delhi Laws Act, 1912*, (noting the proposition Congress may not abdicate its duty or transfer to others the essential legislative functions with which it is vested, but also observing Congress may establish policies and standards and thereon delegate to others a task and sufficient discretion to make subordinate rules within prescribed limits as thought necessary to implement a law or policy of the legislature) (citing *Panama Refining Co.*, 293 U.S. at 421).

124. *Panama Refining Co.*, 293 U.S. at 415.

recent years.¹²⁵ *Chevron* describes a two-step inquiry for judicial review in the context of an agency's interpretation of a statute granting authority to act.¹²⁶ The first question is whether the legislature spoke directly with respect to a precise issue—if so, the agency must comply with the directive; the second question, reached only if the legislature has not directly spoken with respect to a precise issue, is whether the agency applied a reasonable interpretation of the charge with which it was tasked¹²⁷ in the context of the grant of authority.

The Court has since walked back the idea of substantial deference clarifying a presumption of legitimacy for acts that are the product of formal adjudication, notice and comment rule-making; but not for acts resulting from less formally developed opinion letters, policy statements, manuals and guidelines, indicating the latter are informal resolutions lacking procedural safeguards.¹²⁸ Delegations are thus lawful if a legislature sufficiently details the scope of a delegated action, and the delegate acts with formality in exercising the authority granted.

The takeaway from this is courts defer to the legitimacy of a delegation unless the legislature does not speak directly to the precise issue at hand, or the official upon whom power to act is conferred, acts informally. In such cases, judicial review must be more rigorous. An unresolved question concerns what government branch—the executive, (in exercising discretion), or the judiciary, (in reviewing executive action), has greater interpretive authority.¹²⁹

In *United States v. Mead Corporation*¹³⁰ the Court held interpretive rules issued by the Customs agency were not entitled to *Chevron* deference because tariff decisions are informal adjudications, not-uniform and carry no precedential value or force of law. While formal, generalized expressions of decision-making utilizing notice and comment rulemaking are afforded greater deference than informal adjudications, (the former provide assurance of accountability and good temperament in decision-making); it may be better to apply a case-by-case inquiry in deciding whether deference is proper, (despite the consequent sacrifice of flexibility).¹³¹ Factors to consider include whether a delegation was intended to promote a clearly described policy granting authority to act to a specific delegate and whether there is a

125. Barron & Kagan, *supra* note 81 at 202, 206-212.

126. *Id.* at 206.

127. *Id.*

128. *Id.* at 208 (describing how a lack of procedural formality can equate to a lack of force of law which would require greater rigor and less deference of judicial review in terms of both substance and process).

129. *Id.* at 202.

130. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

131. Barron & Kagan, *supra* note 81 at 225.

sufficiently specific directive as to scope and boundary of authority granted.¹³² Legislative delegations to private entities are never lawful.¹³³ Courts will not issue policy decisions, but when formal procedures are used, courts validate a delegate's reasonable resolution of ambiguity.¹³⁴

The non-delegation doctrine is an interpretive construct of constitutional law. It is a product of causal interactions of separation of powers requisites and due process constraints.¹³⁵ A rigid interpretation of separation of powers requisites bars executive and administrative officials from investing themselves with power to make law, leaving them only with authority to construe and execute law. It is important to note there are circumstances that lend themselves to permit delegation to those better placed to address certain problems and therefore a more flexible application of separation of powers, consistent with the rules set forth here, describing a proper delegation, is a more practical approach compared to a rigid regime of pure separation of powers.¹³⁶ If the law as applied turns out not to be as useful to society as originally intended, then society will be challenged to create

132. *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (holding judicial determination of rules of procedure is a legislative function lawfully delegated to courts leaving the judicial delegate with power to “fill up the details”); *Field*, 143 U.S. at 700 (holding legislature may delegate tariff-setting authority to executive to act as its agent); *Panama Refining Co.*, 293 U.S. at 432 (holding legislature may delegate power to prohibit interstate shipment of oil products in excess of certain quotas to executive to act as its agent, but the law enacted is void because it offered insufficient direction as to implementation of delegation); *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 550-51 (holding legislature may delegate power to approve trade rules drafted by private businesses to ensure fair competition to executive to act as its agent, but the law enacted is void because it offered insufficient direction as to implementation of delegation); *Mistretta v. United States*, 488 U.S. 361 (1989) (holding legislature may delegate power to set criminal sentencing guidelines to a commission under broad general directives so long as it clearly describes a general policy, who is to apply it and offers clear limits as to scope of delegated authority).
133. See cases cited *supra* note 132; see also *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the statute holding the law penalized those failing to observe regulations prescribed by coal producers noting the deficiency in the delegation was the conflict of interest created in private entities such that those making the rules had interests adverse to those who would be regulated which was a violation of due process).
134. *Barron & Kagan*, *supra* note 81 at 227-28.
135. *Id.* at 201 (referring to the fact Congress may not hand over to a given agency official its authority to make policy decisions).
136. See generally *Field*, 143 U.S. at 692 (indicating separation of powers does not bar legislature from conferring significant authority on executive); see also *J.W. Hampton, Jr. & Co.*, 276 U.S. at 405 (holding legislators cannot abdicate constitutionally-granted legislative power entrusted to them, cannot assume constitutionally-granted executive or judicial power and no branch may intrude on the province or jurisdiction of any other branch of government).

alternative methods to better use, order and structure social relations. The endurance and viability of any enacted law, policy, procedure or regulation is entirely dependent on the public's perception of its social utility.

Chevron deference equates to recognition the legal system is an integral and formative partner in a framework governed by separation of powers. *Chevron* deference stands for judicial respect for traditional legislative and executive lawmaking and responsible execution of law. Such deference is jurisprudential effectuation of the role of courts within a representative government. Courts typically refrain from policymaking which is the role of legislators. Courts assume, unless there is evidence to indicate otherwise, delegates exercise authority responsibly and lawfully.¹³⁷ Delegates are therefore afforded discretion to resolve ambiguity. Interpretive authority in the hands of executive decision-makers is crucial for successful effectuation of policy choices. Experts must be relied on to make proper decisions¹³⁸ according to their expertise. Courts possess dispositive power over legal construction—that is the power to say what the law is; legislatures possess constitutional authority to make law—that is the power to determine policy. The problem with judicial deference in the context of delegated authority is the difficulty in ascertaining the proper balance between interpretive, executive and transformative authority.¹³⁹ This understanding about how delegation operates does not clarify whether the legislative delegation to the governor of Nebraska was lawful—this added knowledge about delegation merely raises awareness of how complex the application of law can be.

VI. SEPARATION OF POWERS, CONFLICT & DELEGATION IN NEBRASKA

Conflict arises when a branch of government in exercising its constitutionally-granted powers, impacts another branch of government. While separation of powers clearly distinguishes separate spheres of influence, there is almost always, some overlap. For example, the legislative branch is authorized by the constitution to set forth a rule of conduct to determine public policy and make law.¹⁴⁰ It may lay down conditions or state facts to be fulfilled or ascertained, and in this manner legislation is implemented by an actor outside the legislature.¹⁴¹ For purposes of discussing delegation in the context of separation of powers, the term delegation refers to conferral of authority to satisfy or fulfill a directive, not the act of conferral of constitu-

137. Barron & Kagan, *supra* note 81 at 201-202.

138. *Id.* at 215, 218.

139. *Id.* at 219 (In such cases, transactional analysis breaks down and becomes “situational rather than logical” or “contingent rather than necessary”).

140. *Id.* at 215.

141. *In re The Delhi Laws Act, 1912.*

tionally-granted powers by one body of the government to another.¹⁴²

The Nebraska State Constitution's "Language on the Regulation of Common Carriers" speaks directly to the structure of governance. According to that pronouncement, unless the legislature enacts some law directed specifically to restrict the NSPSC's authority to retain control over a certain class of common carriers for itself, it cannot constitutionally be deprived of its original, constitutionally-derived regulatory powers.¹⁴³

The question raised by the legislative action in *Thompson* is whether the legislature properly divested the NSPSC of its jurisdiction.¹⁴⁴ As the legislature did not retain regulatory power for itself, and instead delegated the power to the governor, the question concerns the constitutionality of the law based on delegation of authority to another government branch.

In *Thompson* conflict arose among the branches of state government when the legislature divested NSPSC of its authority, transferring said authority, along with the legislative taking power, to the executive.¹⁴⁵ The governor fast-track-approved the pipeline construction route and transferred the power to take easements to Keystone, effectively granting a private entity public condemnation power.¹⁴⁶ The delegation thus raised separation of powers concerns.¹⁴⁷ What complicated matters was the fact, although courts generally presume enacted statutes are constitutional, the statute appeared flawed (it was quickly written and hastily enacted) and Nebraska's supermajority prerequisite for voiding legislation¹⁴⁸ failed to check the legislature.

The law and economics literature focuses on efficiency of resource allocation to optimize social value. The state is obliged to enhance economic efficiency in land use decisions to promote public good. There is a presumption takings are socially justifiable because government officials are held accountable for their actions. What typically occurs is a public official declares a need for a taking¹⁴⁹ justified by its public-good-promoting purpose, the legislature authorizes an implementation plan and delegates authority to move the plan forward. If there is a challenge to the legitimacy of a proposed action, the judiciary reviews procedural steps taken, but defers to official action committed in accordance with law.

142. *Id.*

143. NEB. CONST. art. 4, § 20.

144. *Thompson*, 857 N.W.2d at 751-52.

145. *Id.* at 739-40.

146. NEB. CONST. art. 1, § 21; NEB. CONST. art. 4, § 20; NEB. REV. STAT. § 57-1101 (2017).

147. Singh, *Separation of Powers*, *supra* note 20 at 312.

148. NEB. CONST. art. V, § 2.

149. Singh, *Separation of Powers*, *supra* note 20 at 314.

State use of takings should be to promote public good. The application of takings law in *Thompson* produced an unintended result of eroding ownership rights¹⁵⁰ because the state declared it could route the pipeline and take the land of private citizens to do so. It is odd to see conservative property owners and environmentalists on the same side of a case, but that is what happened in *Thompson*. Defense of owner rights is possible in the course of judicial review because courts possess authority to void legislative acts improperly delegating authority to an executive.¹⁵¹ While state action is presumed legitimate¹⁵² in *Thompson* the owners claimed the legislature unlawfully transferred to the executive regulatory powers reserved to an independent agency. The owners asserted the legislative authorization to the governor was *Kelo*-type pretext¹⁵³ favoring a private company's interest in creating an improvement for its own profit—not primarily to promote public good. But the property owners did not prevail in court.

Why did the delegation and public use arguments fail? The owners claimed the statute¹⁵⁴ effected dispossession to promote a private corporate benefit, the claimed public purpose was speculative, exaggerated¹⁵⁵ and illusory and the public purpose claim was in fact a conferral of economic benefit on a private entity. Takings of land typically involve a forced exchange to generate a surplus, but state and private entities are not supposed be the primary beneficiaries of the surplus produced, if any.¹⁵⁶ Because the power to determine whether an alleged public purpose is sufficiently legitimate rests with the public official tasked with implementing an approved policy, the only safeguard to ensure against abuse of power by unlawful condemnation is active, rigorous, strict-scrutiny judicial review.

The form and substance of judicial review is typically deferential, with a presumption of validity difficult to overcome. In *Thompson* the court was called upon to decide a separation of powers and legitimacy-of-delegation matter.¹⁵⁷ Corporate shareholders, certain business interests and a number of politicians supported the project, while property owners and environmental

150. See Harrigan, *supra* note 13 at 227-31.

151. Darren Summerville, *The Nondelegation Doctrine after Whitman v. American Trucking Associations: Constitutional Precedent Breathes a Sigh of Relief*, 18 GA. ST. U.L. REV. 627, 632 (2001).

152. Singh, *Separation of Powers*, *supra* note 20 at 314.

153. Murphy, *supra* note 19 at 98-100.

154. 2012 Neb. Laws, L.B. 1161.

155. See Harrigan, *supra* note 13 at 227-31.

156. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY & THE POWER OF EMINENT DOMAIN* (Harvard Univ. Press, 1985, 1993) (arguing any gain or enhanced value from land assembly for development ought not benefit private, rent-seeking individuals; instead such surplus is a public good belonging to society).

157. See *Thompson*, 857 N.W.2d at 751.

groups opposed it. The legislature enacted a law to facilitate approval.¹⁵⁸ Potentially impacted landowners challenged the statute claiming the delegation was unlawful.¹⁵⁹ A lower court held the statute violated the state constitution because it interfered with a constitutional grant of regulatory jurisdiction.¹⁶⁰ The state's highest court reversed the lower court, but the decision was ineffective because it was not binding as only four judges found the lower court to be correct.¹⁶¹

The legal system is established to interpret and apply law to facts. While the judicial branch possesses some capacity to protect individuals against deprivation of personal and property rights, that capacity is limited by law and practical expediency. Review of the facts should lead to equitable results, but it is the unfortunate pathos of law, when that is not the case. Where judicial protection falls short, there is risk state interference with private rights may occur to promote a private purpose. This is an example of the privatization of law where the state is itself transformed into capital, and law is a means to the end of promoting capital accumulation under guise of promoting public good, making private gain the equivalent of public good.

Delegation is a tool used by public officials to enhance the efficiency of their governance by outsourcing to experts, certain tasks to implement rules and policies. Legislators are not experts in the fields they regulate. They therefore empower experts to act on their behalf. That was what the commission in Nebraska was established to do. While the legislature could lawfully retain the power of regulation for itself, it specifically chose to delegate that power to the executive. While the scope and boundaries of the delegation were limited, the question in this case is whether the legislature could properly delegate to the executive a power already constitutionally placed within an independent agency.¹⁶² A majority of judges determined the delegation was unlawful, but because a supermajority is constitutionally required to void a legislative enactment, the statute remained valid.¹⁶³

If *Thompson* had addressed the merits of the case, it likely would have declared the legislative delegation unlawful because the transfer of power to the governor to facilitate route approval was a delegation of authority the

158. Legis. B. 1161, 102nd Leg., 1st Spec. Sess. (Neb 2012).

159. *Thompson*, 857 N.W.2d at 751 (claiming transfer of authority from NSPSC to the governor was an unlawful transfer of legislative taking authority to Keystone company); see also Harrigan, *supra* note 13 at 210 (describing the argument of insufficient justification to abrogate owner rights).

160. *Id.*

161. See *Thompson*, 857 N.W.2d at 751.

162. NEB. CONST. art. 1, § 21.

163. See *Thompson*, 857 N.W.2d at 766.

legislature *did not have*. Additionally, the transfer of legislative takings power to the governor, who in turn intended to transfer that power to Key-stone, was also unlawful because private parties cannot exercise government power.

Although delegations are presumed legitimate, such acts must follow established procedure and create a definitive record, explaining all the steps taken in the decision-making process, to enable a court to determine whether a public official has exceeded her authority.¹⁶⁴ It appears from careful review of *Thompson* the legislature exceeded its authority when it transferred independent agency route approval and legislative takings authority to the governor.

Where authority to delegate power is proper, a fatal problem with some aspect of the delegation can occur if there is a clear absence of a policy to guide the executive in its decision-making process and exercise of discretion, as occurred in *Panama Refining*¹⁶⁵ and in *Schechter*.¹⁶⁶ To be lawful, a delegation must possess an intelligible standard that properly guides the delegate in implementation.¹⁶⁷ Such a standard may be found in a declaration of policies or statement of purposes sufficiently narrow and specific to a particular industry, question or problem.¹⁶⁸ If the charge in the delegation is vague or if no intelligible standard can be derived, the delegation is deficient.¹⁶⁹

Some theorists argue juridical preference for formality and total specificity of direction can have negative repercussions on delegations, including limiting flexibility and increasing transaction costs.¹⁷⁰ Constitutionally adequate standards are those that are fair and reasonable, operate in the public interest and respond to public necessity or are intended to protect the health, safety and welfare of the public.¹⁷¹ Such terms of art are referenced as satisfactory components, reasonably implicit in a lawful delegation. What seems necessary for legitimacy is the delegation provide clear guidance, describe a broad policy objective and lend itself to providing a measure of discretion in grantees to act such that trusted actors possess necessary and sufficient flexibility to adjust to evolving economic, political and social needs, as the

164. *Carter*, 298 U.S. at 310.

165. *Panama Refining Co.*, 293 U.S. at 405.

166. *A.L.A. Schechter Poultry Corp.*, 295 US 495 (where power to formulate codes of fair competition for an entire industry was considered too broad a delegation of authority).

167. *Mistretta*, 488 U.S. at 372 (1989) (quoting *J. W. Hampton, Jr., & Co.*, 276 U.S. at 409 (1928)).

168. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541.

169. *Id.*

170. Barron & Kagan, *supra* note 81 at 230-232.

171. *See supra* notes 132-33, 136 and accompanying text.

case may be.¹⁷²

With respect to setting forth clear standards, proper records must be maintained to ensure minimum necessary requirements of notice, hearing and findings and considerations of fact are satisfied. This enables for meaningful judicial review. Only with those protections in place would implementing a lower level of judicial review with enhanced deference be appropriate. Delegations supported by a fully developed record are more trustworthy than delegations lacking in safeguards of notice, hearing, statements, binding orders and consideration supported by facts.

VII. CONCLUSION—LAW AS A MEANS TO AN END

Law is described as a means to an end.¹⁷³ Historically the state has used law as a tool to promote order and progress. There are multiple examples of state use of force under color of law to establish economic, political or social change.¹⁷⁴ There are connections between economic development and public good, but when economic development takings are used to achieve those goods, forced dispossession triggers the need to carefully review whether rights deprivations are justifiable.¹⁷⁵ Takings are excused by the claim of necessity, but the authenticity of that claim is questionable when takings are used to promote private interests.¹⁷⁶ State-authorized condemnation juxtaposes civic duty with social obligation, owner rights with responsibilities and privilege with social liability. The argument developed here is the state is pushing the law of takings toward satisfaction of private interests, which broadens the public use concept. *Kelo* held economic development is a public use.¹⁷⁷ In making that claim, the Court stretched the meaning of public use.¹⁷⁸ Is public use now the equivalent of private gain? Property is creative when facilitating productivity, but is destructive when it erodes personal autonomy.

Distinctions between social relations and relations of production collapse when the state claims to promote public good by reordering access to and permission for use of limited resources. The state achieves legitimacy by offering a sound rationale for intervention on owner rights. It claims to require fairness and equal treatment under the law, but certain takings do not reveal this to be true. Takings were historically about use of state power

172. *Id.*; Barron & Kagan, *supra* note 81 at 214.

173. TAMANAHA, *supra* note 38 at 6-7.

174. Examples include taking land for infrastructure development and the civil rights movement.

175. *See supra* notes 20-29 and accompanying text.

176. *See supra* note 19 and accompanying text.

177. *Kelo*, 545 U.S. 469; *see supra* notes 10-11 and accompanying text.

178. *Kelo*, 545 U.S. at 489.

to impose necessary ends that could not otherwise be achieved through voluntary market exchange.¹⁷⁹ Condemnation expropriation is a lawful means to displace and enclose to accommodate capital accumulation.¹⁸⁰ The proof of this is so is the broadened meaning of public use in the years since *Berman*.¹⁸¹

The *Keystone* litigation moves this process along further because *Thompson* demonstrates court failure and further privatization of law leading to further privatization of social relations and the state.¹⁸² This most recent example of expanding privatization of law demonstrates continued erosion of private rights.¹⁸³ Should this trend continue, there will be further displacements under the neoliberal response to the crisis of capitalism in economically predatory regimes.¹⁸⁴ The only solution to this problem is to maintain a rigorous judicial review of public-private acts and reversal of state action that exceeds the proper scope and boundary of lawful authority.¹⁸⁵ One way to minimize the problem of grants of authority in excess of what is lawful is to more narrowly draft the terms, conditions and provisions of policies and procedures such that public officials tasked with performing certain duties are limited to the narrow terms of a proper delegation granted for a specific purpose and clearly consistent with promoting public good.

179. See generally HORWITZ, *supra* note 18 (detailing the transformation of states' use of the takings clause).

180. Farshad Araghi, *Accumulation by Displacement: Global Enclosures, Food Crisis, and the Ecological Contradictions of Capitalism*, 32(1) REV. (FERNAND BRAUDEL CTR.) 113-46 (2009).

181. *Berman v. Parker*, 348 U.S. 26 (1954) (requiring blight to justify redevelopment takings).

182. See *supra* notes 41-61 and accompanying text.

183. Murphy, *supra* note 19 at 111-12.

184. Araghi, *supra* note 180 at 135.

185. Murphy, *supra* note 19 at 108.